ularly served with the notice and appears, pleads and tries the case, must be held to have waived all questions of jurisdiction over the person arising out of his place of residence.

I have examined all the instructions carefully and taken in connection with the issues upon the notice and special plea, I think they presented the law of the case to the jury in a manner as favorable for the defendant as could be expected.

The case was one for the jury and the Court does not feel warranted in interfering with the verdict.

The motion to dismiss and the motion for a new trial will be overruled.

SUPREME COURT OF APPEALS OF VIRGINIA.

SHIFLETT *v.* COMMONWEALTH.

March 20, 1913.

[77 S. E. 606.]

1. Intoxicating Liquors (§ 208*)—Offenses—Indictment—Time of Offense—Negativing Limitations.—While, under Code 1904, § 3999, providing that an indictment shall not be invalid for omitting to state the time at which the offense was committed, the indictment for unlawfully selling intoxicants need not allege the precise time of the sale; it must allege facts showing that the offense charged was committed within the period of limitations.

[Ed. Note.—For other cases, see Intoxicating cases, see Intoxicating Liquors, Cent. Dig. §§ 228, 261; Dec. Dig. § 208.*]

2. Indictment and Information (§ 60*)—Sufficiency.—An indictment is not good as a rule, unless, assuming its allegations to be true, it shows a prima facie case for punishment.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. § 60.*]

3. Indictment and Information (§ 60*)—Sufficiency.—The indictment is insufficient if it may be true without making accused guilty of the offense.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 182, 266, 267; Dec. Dig. § 60.*]

4. Intoxicating Liquors (§ 208*)—Offenses—Indictment.—An indictment which recited that it was found at the December term, 1912, and charged that accused "within 12 months on the last preceding 191—, in the said county," did sell, etc., without a license, sufficiently

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

showed that the offense was committed within the statutory period of limitations, and was sufficient notwithstanding the omission in charging the year in which the offense was committed.

[Ed. Note.—For other cases, see Intoxicating Liquors, Cent. Dig. §§ 228, 261; Dec. Dig. § 208.*]

5. Indictment and Information (§ 119*)—Nonessential Averments.—The courts are inclined to treat as surplusage all improper averments in indictments, where the remaining allegations set out the offense charged with substantial certainty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 311-314; Dec. Dig. § 119.*]

6. Indictment and Information (§ 114*)—Allegations—Second Offense.—Where an offense is punishable by statute with a higher penalty if it is a second or subsequent offense, the indictment must so allege, in order to impose the higher penalty.

[Ed. Note.—For other cases, see Indictment and Information, Cent. Dig. §§ 301-307; Dec. Dig. § 114.*]

Error to Circuit Court, Greene County.

Marcus Shiflett was convicted of unlawfully selling intoxicants, and brings error. Reversed in part, and affirmed in part. See, also, 77 S. E. 608.

John S. Chapman, of Stanardsville, for plaintiff in error.
The Attorney General, for the Commonwealth.

BUCHANAN, J. The first error assigned is that the trial court erred in not sustaining the demurrer to the indictment.

The following is a copy of the indictment: "The jurors of the commonwealth of Virginia in and for the body of the county of Greene and now attending the circuit court of said county at its December term, 1912, upon their oath present that Marcus Shiflett within twelve months on the last preceding 191—, in the said county, did unlawfully sell ardent spirits without having obtained license to do so, against the peace and dignity of the commonwealth of Virginia."

The objection made to the indictment is that the averment in it as to the time when the offense was committed is meaningless, and that it does not charge the date of the sale nor such facts as show that the sale was made within two years prior to the indictment, the statutory period for the prosecution of such offenses.

[1-3] While it is not necessary in a prosecution for the unlawful sale of ardent spirits for the indictment to state the pre-

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.

cise time of the sale (section 3999 of the Code; Savage's Case, 84 Va. 619, 5 S. E. 565; Arrington's Case, 87 Va. 96, 12 S. E. 224, 10 L. R. A. 242; Runde's Case, 108 Va. 873, 61 S. E. 792), it is necessary where there is a statute of limitations (as in this case) barring the prosecution after a certain time that such facts should be stated in the indictment as will show that the offense charged was committed within the statutory period; for no indictment, as a general rule, is good unless, assuming its allegations to be true, it discloses a prima facie case for inflicting the punishment provided by law. If the indictment may be true, as was held in Young's Case, 15 Grat. (56 Va.) 664, and in Bruce's Case, 26 W. Va. 153, 157, both prosecutions for selling liquor in violation of law, and still the accused may not be guilty of the offense, the indictment is insufficient. See, also, 1 Bishop's Cr. Proc. §§ 403, 405; Whart. Cr. Pl. & Pr. §§ 137, 318.

[4, 5] While the words, "on the last preceding 191—," following the words, "within twelve months," are meaningless, they may be treated as surplusage and rejected if the indictment is thereby made sensible (1 Bishop's New Cr. Pr. § 158; Commonwealth *v.* Randall, 4 Gray [Mass.] 36, 38); for courts of justice are disposed, as said by the court in the case last cited, to treat as surplusage all erroneous and improper averments in complaints and indictments where the residue of the allegations sets out the offense charged in technical language, and with substantial certainty and precision. After rejecting the words "on the last preceding 191—," the indictment states that the grand jury attending the circuit court of Greene county, at its December term, 1912, "upon their oath present that Marcus Shiflett within twelve months * * * in the said county did unlawfully sell ardent spirits without having a license to do so." These are apt and sufficient words to show that the offense charged was committed within the statutory period. We are of opinion, therefore, that the demurrer was properly overruled.

The remaining assignment of error is that the court erred in imposing an additional punishment of six months' confinement in the county jail, on the ground that the offense of which the accused was found guilty was a second offense.

By section 27 of an act approved March 15, 1910 (Laws 1910, c. 190), known as the Byrd Liquor Law, it is provided, among other things, that a person violating the provisions of that act shall be guilty of a misdemeanor, and unless otherwise provided therein shall be fined not less than $50, nor more than $100, and, in addition, he may in the discretion of the court be imprisoned not more than 60 days, and required to give bond, etc., and that for the second and each succeeding offense he shall be fined not less than $100, and shall be confined in jail not less

than 6 nor more than 12 months. The verdict of the jury found the accused guilty of the offense charged in the indictment, and fixed his fine at $100. The court, exercising the discretion given it under the statute, in entering up judgment for the fine, added 60 days' imprisonment in jail in addition to the fine, and also imposed a further punishment of 6 months in jail upon the accused. This latter punishment of 6 months in jail was, as the accused insists, clearly without authority. There was no charge in the indictment upon which the accused was prosecuted that the offense charged was a second or subsequent offense.

[6] It is well settled that where an offense is punishable with a higher penalty, because it is a second or subsequent offense of the same kind, such severer punishment cannot be inflicted unless the indictment charges that it is a second or subsequent offense, because by the rules of criminal pleading the indictment must always contain an averment of every fact essential to the punishment to be inflicted. Welsh's Case, 4 Va. 57; Rand's Case, 9 Grat. (50 Va.) 738; Wharton's Cr. Pl. & Pr., §§ 934, 935; 1 Bishop's Cr. Law (7th Ed.) § 961; Bishop on Stat. Cr. § 240.

It follows from what has been said that the action of the court in imposing the additional punishment of six months in jail upon the accused, and declaring that he should constitute a part of the state convict road force, was erroneous, and to that extent said judgment must be reversed and annulled, and in other respects affirmed.

Reversed in part; affirmed in part.

CITY OF RICHMOND v. BURTON.

June 12, 1913.

[78 S. E. 560.]

1. **Municipal Corporations (§ 360*)—Sewer Construction—Extra Excavation—Knowledge of City.**—Where during the excavation of a sewer trench under a city contract, it was found that the sides of the trench would give way, and to prevent this it was necessary to put in timber and fill in the sloughing places with bricks, whereupon the contractor suggested a remedy by excavating the ditch wider than provided by the profiles, which suggestion was adopted with

*For other cases see same topic and section NUMBER in Dec. Dig. & Am. Dig. Key No. Series & Rep'r Indexes.